

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

COLUMBIA MEMORIAL HOSPITAL

and

Case 03-CA-142160

KIMBERLY BISHOP, an Individual

and

Case 03-CA-144364

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

Charles Guzak and John Grunert, Esqs.,
for the General Counsel.
Richard P. Walsh, Jr., and Paul E. Davenport, Esqs.
(Lombardi, Walsh, Davenport & Amodeo, P.C.),
for the Respondent.
Jay Jaffe, Esq. (1199 SEIU Law Department),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Albany, New York, on May 5 and 6, 2015. The complaint alleged that the Columbia Memorial Hospital (the Hospital or Respondent) violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act (the Act) via: its *Business Conduct* policy; disciplining Kimberly Bishop and denying her transfer; and failing to provide requested information to 1199 SEIU United Healthcare Workers East (the Union).

On the entire record,¹ including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following:

¹ The Board previously found that the Hospital violated Sec. 8(a)(3) by disciplining Cindy Northrup because of her Union activities. See *Columbia Memorial Hospital*, 362 NLRB No. 154 (2015).

FINDINGS OF FACT²

I. JURISDICTION

5 The Hospital, a corporation, operates a medical center in Hudson, New York. Annually, it derives gross revenues exceeding \$250,000, and purchases and receives goods exceeding \$5,000 directly from points outside of New York. It admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act. It also admits, and I find, that the Union is a labor organization, within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

15 The Union and Hospital have enjoyed a longstanding bargaining relationship. The Union is the exclusive collective-bargaining representative of the following bargaining unit (the unit):³

20 All full-time and regular part-time registered professional nurses [RNs] including per diem registered nurses, pharmacists, physical therapists, medical technologists and histology technologists employed by [the Hospital] excluding all confidential employees, all human resource employees, all data processing employees, all clerical employees, all maintenance employees, all administrative employees, all department secretaries, all professional employees, guards, supervisors and all other employees.

25 (GC Exh. 2). The parties' most recent contract runs until December 31, 2015 (the CBA). Timothy Rodgers, Union Organizer, represents the unit in grievances, arbitrations and negotiations. He is aided by Union delegates, who process grievances and enforce the CBA.⁴

B. Information Request – Melded Seniority List

30 In early 2013, Rodgers requested the unit's melded seniority list. He stated that the CBA defines this list as a roster containing bargaining unit, classification, and unit (i.e. departmental) seniority.⁵ See (GC Exh. 2 at Art. 7). The CBA legislates where different seniorities apply,⁶ and requires the Hospital to provide a melded seniority list twice annually. (Id.). Between

2 Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

3 The Union also represents a separate unit of the Hospital's service and technical workers, who are not at issue.

4 Union delegates are unit employees, who serve as shop stewards.

5 "Bargaining unit seniority" is "the length of time an Employee has been continuously employed ... [at] the Hospital." (Id. at Art. 7, Sec. 1(a)). "Classification seniority" is the "length of time an Employee has worked continuously as a [unit employee]." (Id. at Art. 7, Sec. 1(b)). "Unit based seniority" is ... an employee's "most recent date of hire [in their present] ... unit [or department]." (Id. at Art. 7, Sec. 1(c)).

6 "Bargaining unit seniority ... appl[ies] ... for all benefits where length of service is a factor." (GC Exh. 2 at Art. 7, Sec. 6(a)). "Classification seniority shall apply to shift rotation, layoffs [and] recalls." (Id. at Art. 7, Sec. 6(b)). "Unit based seniority shall apply to transfers, promotions, and vacation scheduling." (Id. at Art. 7, Sec. 6(c)).

September 2013 and April 2015, the parties exchanged several communications regarding the melded seniority list; these exchanges are described below:

<u>Date(s)</u>	<u>Sender</u>	<u>Receiver</u>	<u>Summary</u>
Sept. 30, 2013	Hospital	Union	Letter reporting Union’s ongoing melded seniority list request.
Oct. 3, 2013	Union	Hospital	Letter confirming an Oct. 8 meeting to discuss the issue.
Jan. 9, 2014 ⁷	Hospital	Union	Letter enclosing a list containing only bargaining unit seniority.
Mar. 18	Union	Hospital	Letter reiterating Union’s ongoing melded seniority list request.
Mar. 18	Hospital	Union	Letter relating that creating a list is a “time consuming endeavor.”
April 25	Hospital	Union	Letter confirming Hospital’s availability to meet in May about the list.
May 1	Hospital	Union	Confirming May 5 meeting to discuss the melded seniority list.
May 22	Hospital	Union	Letter stating that list is an “arduous task” because of computer issues.
Sept. 2	Union	Hospital	Letter lamenting about delay and giving Hospital a Sept. 5 deadline.
Sept. 8	Hospital	Union	Letter stating that the Hospital will continue its efforts.
Nov. 21	Union	Hospital	Letter lamenting the Hospital’s delay and giving it a new Dec. 2 deadline.
Dec. 31	Union	Hospital	Email lamenting the ongoing delay and giving Hospital a new deadline.
Jan. 8, 2015	Union	Hospital	Letter stating that the Union will seek arbitration over the issue.
Jan. 26, 2015	Hospital	Union	Letter enclosing a list containing only classification seniority.
Apr. 30, 2015	Hospital	Union	Letter enclosing an incomplete list with bargaining unit, classification and unit seniority for some employees.

5 (GC Exhs. 3–22A; R. Exhs. 14–15).

Rodgers related that the Hospital’s April 30, 2015 attempt to provide a complete list was deficient in two ways. First, although it contained all 3 seniorities, it failed to list all unit employees.⁸ See (GC Exh. 22A). Second, it neglected to sufficiently identify the departments where employees were assigned, i.e. it only listed “Dept ID” and “Contract ID,” which made it impossible to decipher unit seniority without a key. Since April 30, 2015, the Hospital has not provided a corrected list resolving these deficiencies. Rodgers added that the Union has been hampered by the Hospital’s recalcitrance and has several pending arbitrations involving seniority matters. The Hospital did not rebut Rodgers’ credible testimony about the April 30, 2015 list’s deficiencies, or challenge its relevance; such testimony has, thus, been credited.

Kelly Sweeney, Director of Human Resources, testified that problems with the Human Resources Information System (HRIS), and the Union’s lack of clear guidance, delayed the production of the list.⁹ She related that the Hospital hired an outside consultant to assist. Bryan Melino, a Report Writer, who prepares reports from the Hospital’s HRIS databases, prepared the April 30, 2015 list. He related that he worked on this project from September 2014 to April 2015, and logged about 10 hours per week. He added that the Hospital’s delay in preparing a complete melded seniority list was largely caused by a software conversion in 2010, which made it extremely difficult to access historical personnel data for certain unit employees.

⁷ All dates are in 2014, unless otherwise stated.

⁸ Rodgers related that the list was incomplete because it described only 525 of 775 unit employees. (Tr. 115).

⁹ Her contention that she needed the Union’s guidance to understand what a melded list was is incredible, given that the CBA clearly defined the 3 seniority levels and “melded” is commonly understood to mean combined.

C. *Business Conduct Policy*

The General Counsel has alleged that portions of the Hospital's *Business Conduct* policy are unlawful; this policy provides, inter alia, as follows:

POLICY:

[Employees] are entitled to respectful treatment in ... [the] workplace. Being respectful means being treated honestly and professionally A respectful workplace is a working environment that is free of inappropriate behavior

GUIDELINES:

A respectful workplace:

[The] ... Hospital is committed to providing a workplace in which the dignity of every individual is respected. [H]arassment and inappropriate behavior will not be tolerated

Inappropriate behavior:

Our goal is to have a work environment where we all treat each other respectfully and professionally. Any unprofessional or disrespectful behavior, even if not illegal, interferes with that goal and will not be tolerated

Achieving a respectful workplace:

[The] ... Hospital expects respectful and professional behavior at all times Remember that your actions reflect upon you, and ... [the] Hospital.

(GC Exh. 25).

D. *Bishop Discipline*

Bishop, an RN and Union Delegate, was disciplined under the *Business Conduct* policy. Her discipline was connected to a conversation with Sarah Every, a Respiratory Therapist, concerning the Hospital's *Bi-Level Positive Airway Pressure* (BIPAP) policy.

1. *September 11 Email*

On September 11, Bishop emailed Cindy Northrup, another Union Delegate. Her email related that unit members were alarmed about an RN's recent discipline under the BIPAP policy,¹⁰ and had several questions and concerns. (GC Exh. 23.)

¹⁰ In August, a unit RN was disciplined for violating the BIPAP policy, while transferring a patient.

2. September 14 Discussion with Every About the BIPAP Policy

In furtherance of her investigation into the BIPAP policy, on September 14, RN Bishop approached Respiratory Therapist Every, and asked to speak to her while Every performed a patient’s respiratory evaluation.¹¹ Every consented, and Bishop then inquired about the BIPAP policy and connected disciplinary issue. Their conversation lasted only a few minutes.

Every stated she mistakenly believed that Bishop had a patient care concern, and was somewhat blindsided, when she asked about the BIPAP policy as a Union delegate. She said that she felt “interrupted” by this line of questioning, and averred that her ability to attend to her patient became compromised.¹² She indicated that she declined to reply to Bishop because she did not wish to become enmeshed in Union business.¹³ She reported that Bishop then relented and departed. Every reported Bishop to Kathy Huron, Director of Patient Safety, who, in turn, directed her to file a complaint with the Human Resources department.

Bishop described the conversation as cordial and unremarkable. She denied interfering with patient care and insisted that Every was initially happy to talk, until she realized that their conversation involved a “Union” issue.

Inasmuch as Every averred that Bishop hindered patient care, and Bishop denied any interference, a credibility determination must be made. For several reasons, I credit Bishop. First, if conversing with a coworker would have truly jeopardized patient care, Every, a professional, would have simply declined Bishop’s solicitation. Every’s initial willingness to talk undercuts any allegation of compromise. Second, Every’s credibility was further strained by her admitted bias against the Union. Third, beyond Every’s isolated claim of compromise, there is no corroborating evidence of actual patient harm. Lastly, I found Bishop to be a credible witness, with a strong, thoughtful, and cooperative demeanor.

3. Discipline – Verbal Corrective Action

On October 16, Nurse Manager Kathy Hazen and Nursing Recruiter Cathy DeChance confronted Bishop about Every’s complaint. Bishop, who was surprised, denied jeopardizing patient care.¹⁴ On October 30, Bishop received a verbal corrective action for, “inappropriate behavior – breach of business conduct policy.” (GC Exh. 24); see also (GC Exhs. 26–27).¹⁵ Union delegate Northrup averred that workplace conversation is generally unrestricted.

¹¹ The patient was chronically aided by a ventilator and unable to perceive their discussion.

¹² She agreed that she is periodically interrupted during patient procedures by phone calls and other matters.

¹³ Every conceded that she felt negatively about the Union, but denied that such feelings prompted her complaint.

¹⁴ During this meeting, DeChance replied, “now you know how we feel when we get a grievance from you.” (Tr. 185). Neither Hazen nor DeChance testified; Bishop’s credible testimony on this point was, thus, credited. *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to call a witness “who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference ... regarding any factual question on which the witness is likely to have knowledge.”).

¹⁵ In a separate statement, Hazen said that Bishop was disciplined for creating a “safety concern.” (GC Exh. 28).

E. Job Transfer

On October 3, the Hospital posted 2, part-time, RN positions in the maternity unit. (GC Exhs. 29, 31). The postings described, inter alia, these prerequisites: an RN degree and
 5 licensure; understanding of nursing procedures; BLS certification;¹⁶ and a year of medical-surgical experience. (Id.).

On October, 7, Bishop, who satisfied the jobs' prerequisites, applied for both slots. (GC Exhs. 30, 32). She interviewed on October 16 with Nurse Manager Deb Rugen¹⁷ and
 10 Charge Nurse Amy Clark.¹⁸ She stated that, although the interview went well, she was rejected. (GC Exh. 33). She later learned that an RN without medical surgical experience, Concetta Ferrari, was hired. She surmised that her rejection was connected to her Union activities.

Clark made the decision to reject Bishop. She explained that maternity RNs require
 15 strong critical thinking and teamwork skills, and a long-term commitment to the field. She added that she is a strong proponent of hiring RNs with bachelor's degrees, which she believes enhances critical thinking. Regarding her decision to not offer Bishop the first slot, she explained that Olga Lee, Ferrari, and Bishop applied. She stated that Ferrari was hired because
 20 she adeptly handled a critical thinking exercise, held a BA degree, had plans to obtain a midwifery degree, and possessed a demonstrable commitment to maternity. Regarding her decision to not hire Bishop for the second position, she recollected Bishop, Amy Snowden and Colleen Daley applying. She explained that Snowden was chosen because she had superior unit seniority under the CBA, which is an objective contractual mandate. She opined that Bishop
 25 was, however, a poor candidate because she performed feebly on the critical thinking exercise, did not have a BA degree, and lacked long-term maternity goals. She stated that the medical surgical experience requirement had been previously removed from the job description, and was errantly included in the job posting.¹⁹ See (R. Exh. 12) (revised job description dated June 12, 2014, which preceded the posting at issue). She contended that Bishop's Union activities were
 30 irrelevant, and noted that the maternity floor already has many strong Union supporters.

I fully credit Clark's testimony about the interview and her hiring rationale. Clark was a
 very credible witness, who appeared committed to hiring the best possible candidates for her department. Regarding the first position, it is plausible that an employer would desire someone
 35 like Ferrari, who held a BA degree and demonstrable commitment to maternity, as opposed to a candidate without a BA degree or such commitment. It is also equally credible that poor performance on a critical thinking exercise, which was a key component of the interview, undermined Bishop's candidacy. Regarding the second position, it is equally believable that Clark selected Snowden on the basis of her superior unit seniority, which is a non-invidious criterion required by the CBA.

¹⁶ "BLS" is basic life support.

¹⁷ Deb Rugen is no longer employed by the Hospital.

¹⁸ In January 2015, she was promoted to Director of Women's Health Services.

¹⁹ The revised job description was sent to Rodgers on June 12, who did not challenge receipt. The General Counsel and Union did not challenge this testimony; Clark's un rebutted testimony on this point is, thus, credited.

III. Analysis

A. Deferral to the CBA’s Arbitration Procedure

The Hospital’s contends that deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971) is appropriate; this position is invalid.²⁰ Deferral is appropriate when:

(1) the parties’ dispute arises within the confines of a long and productive collective-bargaining relationship; (2) there is no claim of employer animosity to the employees’ exercise of Section 7 rights; (3) the parties’ agreement provides for arbitration in a very broad range of disputes; (4) the parties’ arbitration clause clearly encompasses the dispute at issue; (5) the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute is well suited to resolution by arbitration.

San Juan Bautista Medical Center, 356 NLRB No. 102, slip op. at 2 (2011).

Deferral is inappropriate herein under the second, fourth and sixth factors. Factor 2 does not support deferral, given that several allegations involve Union animus. *Nissan Motor Corp.*, 226 NLRB 397, fn.1 (1976). Factor 4 does not support deferral, inasmuch as that it is unclear whether the *Business Conduct* policy allegation is covered by the CBA’s arbitration clause. Lastly, factor 6 does not support deferral because information issues generally cannot be deferred. *Team Clean, Inc.*, 348 NLRB 1241, fn. 1 (2005). Deferral is, therefore, unwarranted.

B. Section 8(a)(1) – *Business Conduct Policy*²¹

The *Business Conduct* policy is unlawful because it repeatedly and overbroadly proscribes “inappropriate,” “unprofessional,” and “disrespectful” workplace conduct. The Board has held that analogous limitations are verboten. See, e.g., *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2–3 (2014) (“discourteous or inappropriate attitude or behavior to ... employees”); *2 Sisters Food Group, Inc.*, 357 NLRB No. 168, slip op. at 2 (2011) (“inability or unwillingness to work harmoniously with other employees”); *Knauf BMW*, 358 NLRB No. 164 (2012) (“courtesy rule,” which prohibited “disrespectful” conduct); *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990) (“derogatory attacks on . . . hospital representative[s]”); *Claremont Resort & Spa*, 344 NLRB 832 (2005) (“negative conversations”). The Board has found that such prohibitions are unlawfully overbroad, and “sufficiently imprecise ... [to] encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7.” *2 Sisters Food Group*, supra, slip op. at 2.

²⁰ Deferral is a threshold question, which must be decided before the merits of the unfair labor practice allegations can be considered. *L.E. Myers Co.*, 270 NLRB 1010, 1010, fn. 2 (1984).

²¹ This allegation is listed under complaint pars. 6 and 10.

C. Section 8(a)(1) and (3) – Bishop’s Verbal Warning and Rejected Applications²²

1. Bishop’s Verbal Warning

5 The Hospital independently violated Section 8(a)(1) of the Act, when it issued a verbal corrective action to Bishop under the *Business Conduct* policy. The Board has held that:

10 Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. . . . It is the employer's burden, not only to assert this affirmative defense, but also to establish that the employee's interference with production or operations was the actual reason for the discipline. In this regard, an employer's mere citation of the overbroad rule as the basis for discipline will not suffice to meet its burden. Rather, assuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule.

25 *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 6 (2011) (citations omitted).

30 Bishop was disciplined under the unlawful *Business Conduct* policy for engaging in protected concerted activity (i.e. investigating collective concerns about the BIPAP policy).²³ The Hospital failed to meet its burden and show that Bishop interfered with its operations. As stated, Every’s testimony on this point was not credited. Additionally, Bishop’s verbal corrective action conspicuously failed to cite actual interference with patient care, and solely labeled her conduct as “inappropriate.” I, thus, find that her discipline was unlawful.²⁴

2. Bishop’s Rejected Transfer Applications

35 The Hospital did not violate Section 8(a)(1) and (3), when it rejected Bishop’s applications. Although the General Counsel adduced a prima facie case, the Hospital established that she would have been rejected, irrespective of her protected activities.

²² These allegations are listed under complaint pars. 7 and 11.

²³ See, e.g., *Anco Insulations, Inc.*, 247 NLRB 612 (1980); *The Loft*, 277 NLRB 1444, 465 (1986).

²⁴ It is unnecessary to also decide whether the discipline dually violated Sec. 8(a)(3) because the resulting remedy would be unaltered. See *Tri-Tech Services, Inc.*, 340 NLRB 894, 895–96 (2003).

a. Legal Framework

The framework for analyzing whether allegedly discriminatory actions violate 8(a)(1) and (3) violations is provided under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first demonstrate, by a preponderance of the evidence, that the worker’s protected conduct was a motivating factor in the adverse action. The General Counsel satisfies this initial burden by showing: one’s protected activity; employer knowledge of such activity; and animus.

If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the same adverse action, even absent the protected activity. *Mesker Door*, 357 NLRB No. 59, slip op. at 2 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action, absent the protected conduct. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3–4 (2011). If the employer’s proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). On the other hand, further analysis is required if the defense is one of “dual motivation,” that is, the employer defends that, even if an invalid reason might have played some part in the employer’s motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

b. Prima Facie Case

The General Counsel made a prima facie showing that the Hospital’s rejection of Bishop’s applications was unlawfully motivated. She engaged in protected activity, when she investigated the BIPAP policy as a Union delegate. The Hospital was aware of such activity. Animus is demonstrated by the Hospital’s unlawful issuance of discipline for this activity.²⁵

c. Affirmative Defense

The Hospital persuasively met its burden and showed that it would have rejected Bishop, absent her protected conduct. First, it demonstrated that it properly denied Bishop’s application for the first position, which was tendered to Ferrari. Clark, as noted, credibly testified that Ferrari was a stronger candidate, who adeptly handled a critical thinking exercise,²⁶ held a BA degree in nursing from a 4-year institution,²⁷ had concrete plans to obtain a midwifery degree, and possessed a demonstrable long-term commitment to the maternity specialty.²⁸ Bishop, on

²⁵ Additionally, the Board has held that the Hospital unlawfully disciplined Cindy Northrup because of her Union activities; this violation further demonstrates animus. *Columbia Memorial Hospital*, supra, 362 NLRB No. 154.

²⁶ Clark credibly testified that maternity RNs exercise substantial autonomy and need strong critical thinking skills. She stated that the exercise, which covered an emergency scenario, played a great role in her hiring decision.

²⁷ Clark credibly stated that a 4-year nursing degree provides significant critical thinking training.

²⁸ The General Counsel’s contention that Bishop should have been awarded the first position on the basis of her greater bargaining unit or Hospital seniority is misplaced, inasmuch as *only* unit seniority is relevant

the other hand, performed poorly on the critical thinking exercise, held only a 2-year degree, had no plans to obtain a midwifery degree, and lacked a demonstrable long-run commitment to maternity. Second, the Hospital showed that it legitimately rejected Bishop’s application for the second position, which was given Snowden, on the basis of Snowden’s superior unit seniority.²⁹ I find, accordingly, that this allegation should be dismissed.

D. Section 8(a)(5) – Melded Seniority List Request³⁰

The Hospital violated Section 8(a)(5), when it unreasonably delayed providing portions of, and failed to provide other components of, the melded seniority list. An employer must, generally, provide requested information to a union, whenever there is a probability that such information is necessary and relevant to its representational duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty encompasses the obligation to provide relevant grievance-processing materials. *Postal Service*, 337 NLRB 820, 822 (2002). The standard for relevancy is a “liberal discovery-type standard,” and the sought-after evidence should solely have a bearing upon the disputed issue. *Pfizer, Inc.*, 268 NLRB 916 (1984). Information, which concerns unit terms and conditions of employment (e.g. seniority), is, “so intrinsic to the core of the employer-employee relationship” that it is presumptively relevant. *York International Corp.*, 290 NLRB 438 (1988). The Board has also held that unreasonable delays in providing information are “as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all.” *Woodland Clinic*, 331 NLRB 735, 736 (2000), citing *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). Month-plus delays that are unaccompanied by legitimate excuse are, thus, unlawful. See, e.g., *Pan American Grain*, 343 NLRB 318 (2004), enfd. in relevant part, 432 F.3d 69 (1st Cir. 2005) (3-month delay); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (2 months).

The Hospital unlawfully failed to respond to the melded seniority request. The list was relevant because the CBA utilized various seniority levels to determine competing rights for layoffs, recalls, benefits, transfers and other matters. The list, thus, straightforwardly met the Board’s broad discovery standards. Regarding the delay, the Hospital took almost a year to provide staggered pieces of an ultimately incomplete list.³¹ In spite of its complaints about ongoing HRIS difficulties, the resulting delay remained inexcusable. *Pan American Grain*, supra. Regarding its failure to supply a complete list, it has, to date, failed to provide a list describing the entire unit, or one that clearly shows unit seniority.³² I find, accordingly, that the

under the CBA in determining transfers, and both Bishop and Ferrari lacked unit seniority in the maternity department.

²⁹ As stated, the CBA requires that, “Unit based seniority shall apply to transfers.” GC Exh. 2 at Art. 7, Sec. 6.

³⁰ This allegation is listed under complaint pars. 8–9, and 12.

³¹ Although the record shows that the Union’s first request was on September 30, 2013 (see (GC Exh. 3)), the complaint and underlying charge focused upon the Union’s July 2014 request. (GC Exh. 1).

³² As stated, the April 30, 2015 list, contained only 525 out of roughly 775 unit employees, and made unit seniority indecipherable by listing numbers for “Dept ID” and “Contract ID,” without accompanying definition.

Hospital violated the Act by unreasonably delaying its partial response, and by, to date, wholly failing to provide a complete list.

Conclusions of Law

1. The Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Hospital violated Section 8(a)(1) of the Act by maintaining a *Business Conduct* policy in its Policy and Procedure Manual, which prohibited, “inappropriate,” “unprofessional,” and “disrespectful” exchanges amongst workers.

4. The Hospital violated Section 8(a)(1) of the Act by issuing Kimberly Bishop a verbal corrective action.

5. The Union is, and at all times material times was, the exclusive representative of the employees for the purposes of collective bargaining within the meaning of Section 9(a) of the Act in the following appropriate collective-bargaining unit:

All full-time and regular part-time registered professional nurses including per diem registered nurses, pharmacists, physical therapists, medical technologists and histology technologists employed by the Hospital at its Hudson, New York medical center, excluding all confidential employees, all human resource employees, all data processing employees, all clerical employees, all maintenance employees, all administrative employees, all department secretaries, all professional employees, guards, supervisors and all other employees.

6. The Hospital violated Section 8(a)(1) and (5) of the Act by delaying its provision of, and failing and refusing to provide, relevant and necessary information to the Union in the form of a complete melded seniority list, which has been requested since at least July 14, 2014.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Deferral of these matters to arbitration is unwarranted.

Remedy

Having found that the Hospital committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Given that the *Business Conduct* policy is maintained on an organization-wide basis, it must post a notice at all of its facilities where its unlawful policy has been, or is, in effect. *Longs Drug Stores California*, 347 NLRB 500, 501 (2006); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005).

Its duty to rescind or modify the unlawful policy is governed by *Guardsmark LLC*, supra.³³ The Hospital, having unlawfully issued Kimberly Bishop a verbal corrective action, shall expunge from its records any reference to this discipline, provide written notice of such expunction, and inform her that its unlawful conduct will not be used against her as a basis for future personnel related actions. The Hospital must provide a complete melded seniority list to the Union, to the extent that such information has not already been tendered. It shall also distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. See *J Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended³⁴

ORDER

Columbia Memorial Hospital, Hudson, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Maintaining a *Business Conduct* policy in its Policy and Procedure Manual, which prohibits, “inappropriate,” “unprofessional,” and “disrespectful” exchanges amongst coworkers.

b. Issuing verbal corrective actions or otherwise issuing other discipline to employees because they have engaged in union or protected concerted activities.

c. Delaying in providing, and failing and refusing to provide, relevant and necessary information requested by the Union in the form of a complete melded seniority list. The appropriate bargaining unit is:

All full-time and regular part-time registered professional nurses including per diem registered nurses, pharmacists, physical therapists, medical technologists and histology technologists employed by the Hospital at its Hudson, New York medical center, excluding all confidential employees, all human resource employees, all data processing employees, all clerical employees, all maintenance employees, all administrative employees, all department secretaries, all

³³ “The Respondent may comply with our Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees.” *Guardsmark*, supra at 812 fn. 8.

³⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

professional employees, guards, supervisors and all other employees.

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Rescind or modify the language of the *Business Conduct* policy in its Policy and Procedure Manual, to the extent that it prohibits, “inappropriate,” “unprofessional,” and “disrespectful” exchanges amongst coworkers.

b. Furnish all current employees with inserts for the Policy and Procedure Manual that

1. Advise that the unlawful rules have been rescinded, or

2. Provide the language of a lawful rule, or publish and distribute a revised Policy and Procedure Manual that

- i. Does not contain the unlawful rule, or
- ii. Provides the language of lawful rule.

c. Within 14 days from the date of the Board’s Order, remove from its files any reference to Kimberly Bishop’s verbal corrective action, and within 3 days thereafter, notify her in writing that this has been done and that her discipline will not be used against her.

d. Provide to the Union a complete melded seniority list, to the extent that it has not already done so.

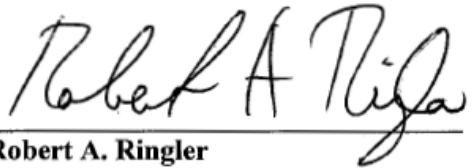
e. Within 14 days after service by the Region, post at its Hudson, New York facility copies of the attached notice marked “Appendix.”³⁵ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 14, 2014.

³⁵ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

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Dated Washington, D.C. November 10, 2015


Robert A. Ringler
Administrative Law Judge

10

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain a *Business Conduct* policy in our Policy and Procedure Manual, which prohibits, “inappropriate,” “unprofessional,” and “disrespectful” exchanges amongst coworkers.

WE WILL NOT issue verbal corrective action, or otherwise discriminate against you because you support the Union or any other labor organization, or engage in other protected concerted activity.

WE WILL NOT delay the provision of, or fail to provide, relevant and necessary information in the form of a melded seniority list requested by the Union, as the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time registered professional nurses including per diem registered nurses, pharmacists, physical therapists, medical technologists and histology technologists employed by the Hospital at its Hudson, New York medical center, excluding all confidential employees, all human resource employees, all data processing employees, all clerical employees, all maintenance employees, all administrative employees, all department secretaries, all professional employees, guards, supervisors and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL rescind or modify the language in the *Business Conduct* policy in our Policy and Procedure Manual to the extent that it prohibits, “inappropriate,” “unprofessional,” and “disrespectful” exchanges amongst coworkers.

WE WILL furnish all of you with inserts for the current Policy and Procedure Manual that:

1. Advise that the unlawful *Business Conduct* policy above has been rescinded, or
2. Provide the language of a lawful *Business Conduct* Policy, or publish and distribute revised Policy and Procedure Manual that:
 - a. Does not contain the unlawful provision, or
 - b. Provide the language of a lawful provision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful verbal corrective action issued to Kimberly Bishop, and we will, within 3 days thereafter, notify her in writing that this has been done and that her discipline will not be used against her in any way.

WE WILL furnish to the Union, to the extent we have not already done so, a complete melded seniority list.

COLUMBIA MEMORIAL HOSPITAL
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Niagara Center Building, 130 South Elmwood Avenue, Suite 630, Buffalo, New York 14202
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-142160 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.